WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

SAMUEL RAMIREZ, *Applicant*

vs.

AEROTEK/ACE AMERICAN INSURANCE administered by ESIS; STAFFING NETWORK/CIGA by its servicing agent SEDGWICK CMS for LUMBERMANS UNDERWRITING in liquidation; ANTHONY INTERNATIONAL INC. Insured by LIBERTY MUTUAL INSURANCE; ROTH STAFFING COMPANIES insured by XL INSURANCE AMERICA administered by SEDGWICK, *Defendants*

Adjudication Number: ADJ9682348
Anaheim District Office

OPINION AND DECISION AFTER RECONSIDERATION

The Appeals Board previously granted reconsideration to further study the factual and legal issues in this case. This is our decision after reconsideration.[1]

The California Insurance Guarantee Association (CIGA) seeks reconsideration of the April 14, 2020 Findings and Order wherein the workers' compensation administrative law judge (WCJ) found that the August 24, 2016 amendment to the application was barred by the statute of limitations. The applicant sought to amend the application to allege that he sustained a cumulative trauma rather than a specific injury.

CIGA contends that Labor Code[2] section 5405 does not act as a bar on amending an application to allege a cumulative trauma injury rather than a specific injury because CIGA continued providing benefits for the injury and the amendment occurred within one year of the last provision of benefits. CIGA also contends that the amended application is not barred by the statute of limitations because the amendment to the application relates back to the original application.

ACE American Insurance Company (ACE) filed an Answer. In the answer, ACE argues that, in order to relate back to the original application, the injury must involve the same set of facts,

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[1] After reconsideration was granted, Commissioner Lowe retired from the Appeals Board. Another panelist has been assigned in her place.

[2] All further statutory references are to the Labor Code unless otherwise noted.

and, because the cumulative trauma injury shifts liability to a different employer and necessitates joining additional employers, the "present case does not arise out of the same set of facts." (Answer, p. 3.)

We have considered the allegations of the Petition for Reconsideration and the contents of the report of the workers' compensation administrative law judge (WCJ) with respect thereto. For the reasons discussed below, we will amend the Findings and Order to find that the amended application is not barred by the statute of limitations.

BACKGROUND

The initial application was filed on October 13, 2014 and claimed that applicant sustained a specific injury on August 21, 2014 to his foot, leg, back, shoulder and arm while employed by Staffing Network insured by Lumbermans Underwriting. Applicant sought to amend the application to claim a cumulative trauma injury through August 21, 2014, to his foot, leg, back, and arm.

Applicant was employed by the general employer Staffing Network and special employer Anthony International from May 20, 2014, through August 21, 2014.

Applicant's employer, Staffing Network, referred applicant to Michael Bazel, M.D., who completed a Doctor's First Report of Occupational Injury or Illness. Dr. Bazel opined that applicant was totally temporarily disabled as a result of a cumulative trauma injury. (Exh. A, September 2, 2014, Michael Bazel, M.D., p. 2.)

Applicant was seen by Satish Kadaba, M.D., in the capacity of panel qualified medical examiner on September 17, 2015. Dr. Kadaba issued a report after the initial evaluation and a supplemental report on November 10, 2015. In both reports, Dr. Kadaba found that applicant sustained a cumulative trauma injury.

At trial, applicant testified that "the insurance company paid him disability benefits and also paid him disability benefits and also provided medical treatment." (January 13, 2020, Minutes of Hearing and Summary of Evidence (MOH/SOE), p.6.)

CIGA asserted in its Petition for Reconsideration that "Lumbermen's/CIGA on behalf of the general employer provided benefits …within one year of the original date of injury and continued through the date of the amended application and continuing." (Petition, pp. 3-4.) CIGA

submitted a single page of a benefit print out showing permanent partial disability advances and a 5710-fee issued to applicant's attorney. (Exh. D, various dates, CIGA Payment Ledger.)

The WCJ and the parties who filed petitions and answers herein all agree that the medical evidence has consistently supported a cumulative trauma injury and that there is no evidence that the injury was a specific injury. (Petition, p. 5, Answer, p. 3, Report, p. 5.)

ANALYSIS

"For the purpose of establishing the date of injury, section 3208.1 distinguishes between 'specific' and 'cumulative' injuries." (*Bassett-McGregor v. Workers' Comp. Appeals Bd.* (1988) 205 Cal. App. 3d 1102, 1109-1110 [53 Cal.Comp.Cases 502]; see also *Western Growers Ins. Co. v. Workers' Comp. Appeals Bd*. (1993) 16 Cal.App.4th 227, 234 [58 Cal.Comp.Cases 323].) A specific injury occurs "as the result of one incident or exposure which causes disability or need for medical treatment," while a cumulative injury results from "repetitive mentally or physically traumatic activities extending over a period of time, the combined effect of which causes any disability or need for medical treatment." (Lab. Code, § 3208.1.) The date of injury for a cumulative injury "is that date upon which the employee first suffered disability therefrom and either knew, or in the exercise of reasonable diligence should have known, that such disability was caused by his present or prior employment." (Lab. Code, § 5412.)

Section 5405 provides as follows:

> The period within which proceedings may be commenced for the collection of the benefits provided by Article 2 (commencing with Section 4600) or Article 3 (commencing with Section 4650), or both, of Chapter 2 of Part 2 is one year from any of the following:
>
> (a) The date of injury.
>
> (b) The expiration of any period covered by payment under Article 3 (commencing with Section 4650) of Chapter 2 of Part 2.
>
> (c) The last date on which any benefits provided for in Article 2 (commencing with Section 4600) of Chapter 2 of Part 2 were furnished.

In *Bassett-McGregor,* the applicant had a heart attack at work on July 27, 1984. Applicant timely filed a claim for compensation for a specific industrial injury. Approximately two years after applicant's heart attack, applicant received a medical opinion that her disability was the result of cumulative trauma and applicant filed a second claim for a cumulative trauma injury. Following

trial, the workers' compensation judge awarded benefits for the cumulative injury and denied applicant's initial claim for specific injury. The Appeals Board granted reconsideration and found that applicant's cumulative trauma claim was barred by the Section 5405 statute of limitations. The Court of Appeal reversed the Appeals Board explaining that in cases where an injury is pled as a specific injury, an amended application alleging a cumulative trauma injury will generally relate back to the original application. The Court explicitly held that "an amendment substituting a claim for cumulative rather than specific injury does not constitute a new and different cause of action…" (*Bassett-McGregor, supra,* at 1116.) However, the Court stated that its holding "is limited to circumstances such as these in which the disability is the same and the injury arose from the same set of facts and is consistent with the guiding principle that claims should be adjudicated on substance rather than formality of statement." (Ibid.)

In this case, the medical evidence supports a finding that applicant sustained a cumulative trauma injury rather than a specific injury and therefore the amended application should relate back to the original application based on a straightforward application of the holding in *Bassett-McGregor.* This is also consistent with the principle that technical defects in pleading and procedure are not a basis to deprive the Appeals Board of jurisdiction.[3]

One difference between this case and *Bassett-McGregor, supra* 205 Cal. App. 3d 1102, is

[3] Labor Code section 5709 states that "No informality in any proceeding or in the manner of taking testimony shall invalidate any order, decision, award, or rule made and filed as specified in this division…" (Lab. Code, § 5709.) Necessarily, failure to comply with the rules as to details *is not jurisdictional*. (citation)" (*Rubio v. Workers' Comp. Appeals Bd*. (1985) 165 Cal.App.3d 196, 200–201, 211 Cal. Rptr. 461 (*Rubio*), italics added; see Cal. Code Regs. Tit. 8, §10517.) "[I]nformality of pleading in proceedings before the Board is recognized and courts have repeatedly rejected pleading technicalities as grounds for depriving the Board of jurisdiction. (citation)" (*Rubio, supra*, 165 Cal.App.3d at p. 200; see Cal. Code Regs., tit. 8, § 10397 [an application for adjudication of claim "shall not be rejected for filing" because it "contains inaccurate information…"].).) "If a party is disadvantaged by the insufficiency of a pleading, the remedy is to grant that party a reasonable continuance to permit it to prepare its case or defense. (citations)" (*Rubio, supra*, 165 Cal.App.3d at p. 200–201.) Consequently, workers' compensation "[p]leadings may be amended by the Workers' Compensation Appeals Board to conform to proof." (Cal. Code Regs., tit. 8, § 10492.) An amended application that "sets forth the required detail" but is filed more than one year from an applicant's date of injury "relates back to the original timely application and preserves the jurisdiction of the Board to hear the matter." (*Rubio, supra*, 165 Cal.App.3d at p. 199–200.)

that, in this case, applicant knew he had sustained a cumulative trauma at the time he filed the application, and, in *Bassett*-McGregor, applicant discovered that the injury was a cumulative trauma injury based on medical evidence obtained after the application was filed. In this case, although the application was imperfectly filed as a specific rather than a cumulative trauma, defendant Lumberman's accepted the claim and began paying benefits. In essence, both defendant and applicant understood that applicant's injury was a cumulative trauma and behaved accordingly.

The WCJ distinguished the instant case from *Bassett-McGregor* because, in this case, amending the application to allege a cumulative trauma injury requires joining additional employers and insurers. (Report, p. 5.) Relying on an Appeals Board panel decision, the WCJ inferred that there are limits to the informal pleading procedure in workers' compensation if defendants are prejudiced by the application of the relation back doctrine. (*Camper v. Val Verde Unified School District* (2018) ADJ11029299, ADJ10664592 [2018 Cal. Wrk. Comp. P.D. LEXIS 253].) "While the [*Camper* decision] applied the relation back doctrine and pointed to the informal pleading procedures in Workers' Compensation, their decision is undergirded by the lack of harm to the Defendant because there was only **one employer/defendant**. (emphasis added)." (Report, p. 5.)

Weighing the harms to various parties is generally undertaken when addressing argument based in equity and is not appropriate here.[4] Furthermore, the *Camper* panel decision that the WCJ relied on to support considering harm as a factor did not state or imply that harm to parties is a consideration when determining whether to allow a pleading to be amended to conform to proof.

Turning to the WCJ's concern with the inequity of joining parties long after the case was originally adjudicated, we acknowledge that, in some cases the Appeals Board follows the general rule that an amendment to an application filed outside the limitations period adding a new party does not relate back to a timely filed application as to that party. (*McGee Street Productions v. Workers' Comp. Appeals Bd.* (*Peterson*) (2003) 108 Cal.App.4th 717, 723–726 [68 Cal.Comp.Cases 708]; *Aguilera v. Heiman* (2009) 174 Cal.App.4th 590, 601–602 [74 Cal.Comp.Cases 583].) However, that general rule is not applicable here where there is a specific

[4] It is possible that, based on the equitable doctrine of laches, a party might be estopped from amending a pleading, but the WCJ does not address the issue of laches. In this case as discussed above, applicant and defendant both proceeded as if the application had been filed for a cumulative trauma. Therefore, is no basis for an argument that applicant should be estopped from amending the application based on the equitable doctrine of laces.

Labor Code section, Section 5500.5, that addresses joinder of defendants and supplemental proceedings to address liability for a cumulative trauma injury.

In addition, even before the Legislature enacted Section 5500.5, a defendant could not assert the statute of limitations as a defense based on failure to name or join a particular defendant. For example, because Section 5405 provided that the limitation period runs from the last payment of any compensation, not from the last payment by the party sought to be joined, a claim against the insurer of a general employer is not barred where it is brought in as a party defendant within six months after the last compensation payment by the special employer originally proceeded against. (*State Compensation Ins. Fund v. Industrial Acci. Com.* (1945) 26 Cal. 2d 278 [10 Cal.Comp.Cases 96].)

Section 5500.5 was enacted in 1951 to codify the holding in *Colonial Ins. Co. v. Industrial Acc. Com.* (1946) 29 Cal.2d 79 [11 Cal.Comp.Cases 226] that an employee who sustains an injury as a result of a progressive occupational disease may obtain an award for the entire amount of permanent disability from any one employer or insurer and the defendant held liable will have the burden of seeking apportionment. "Section 5500.5 is long and complex, but its design is reasonably clear. It is intended to allow an employee to recover for his entire cumulative injury from one or more employers of his choosing for whom he worked within the preceding five years, even though a portion of his injury was incurred in prior employments. The employer or employers against whom compensation is awarded are in turn authorized to seek contribution from other employers in the five-year period." (*Flesher v. Workers' Comp. Appeals Bd.* (1979) 23 Cal.3d 322, 325–326 [44 Cal.Comp.Cases 212].) For workers' compensation claims filed after January 1, 1981, the injured worker may elect against any employer in the year immediately preceding his or her injury. (Lab. Code, § 5500.5(a).)

Employers during the Section 5500.5 period have joint and several liability for all benefits and an applicant may elect against any defendant who is liable for a portion of the cumulative trauma. The "elected against defendant" may seek contribution for awarded benefits from another defendant by filing a Petition for Contribution within one year of an Award. (Lab. Code, §5500.5(e); See *Schrimpf v. Consolidated Film Industries, Inc.* (1977) 42 Cal.Comp.Cases 602 [en banc].) This procedure is intended to promote a prompt determination of an injured worker's entitlement to workers' compensation benefits. (*Rex Club v. Workers' Comp. Appeals Bd. (Oakley-Clyburn)* (1997) 53 Cal.App.4th 1465 [62 Cal.Comp.Cases 441].) A decision or settlement in the

case in chief between the applicant and the elected against insurer is not res judicata, and issues of liability among the defendants are decided de novo. (*Greenwald v. Carey Dist. Co. (Greenwald) (*1981) 46 Cal.Comp.Cases 703 (Appeals Board en banc) .)

Section 5500.5(c) addresses joinder of defendants after an election:

> If during the pendency of any claim wherein the employee or his or her dependents has made an election to proceed against one or more employers, it should appear that there is another proper party not yet joined, the additional party shall be joined as a defendant by the appeals board on the motion of any party in interest, but the liability of the employer shall not be determined until supplemental proceedings are instituted.

In this case, although there was no formal election because the application was filed for a specific injury, now that the application has been amended to conform to proof, it is apparent that Lumbermens was the *de facto* elected against defendant. As Lumbermens is now in liquidation and its claims are administered by CIGA, we will briefly address allocation of liability when CIGA is a party.

CIGA's liability is specifically defined in Insurance Code section 1063.1. While section 1063.1, subdivision (c)(1)(vi) defines "covered claims" as "the obligations of an insolvent insurer … in the case of a policy of workers' compensation insurance, to provide workers' compensation benefits under the workers' compensation law of this state," subdivision (c)(9) provides, "'Covered claims' does not include (i) any claim to the extent it is covered by any other insurance of a class covered by this article available to the claimant or insured …." If there is a solvent insurer for a portion of a cumulative trauma period, that insurer is available "other insurance" for applicant's cumulative trauma injury and CIGA is not liable for benefits. An insurer cannot obtain contribution from CIGA under 5500.5 and CIGA can recover for any benefits paid as a result of the cumulative trauma.

As Section 5500.5 limits liability for a cumulative trauma injury to employers within the last year of injurious exposure, CIGA is not liable for benefits if there is another defendant that is jointly and severally liable for the same benefits, and CIGA can file a petition for contribution within one year of case resolution. Based on Section 5500.5 and the general principles set forth above, apportionment of liability between employers should occur during contribution proceedings and should not impact the applicant. Cases involving CIGA differ from cases

involving employers or insurers because CIGA may have no liability for a cumulative trauma claim or other claims where liability is joint and several.

For the foregoing reasons,

IT IS ORDERED as the Decision After Reconsideration by the Appeals Board that the April 14, 2020, Findings and Order is **AFFIRMED, EXCEPT** Finding of Fact No. 7 and the Order are **AMENDED** as follows:

FINDINGS OF FACT

7. The amended Application for Adjudication dated August 24, 2016, as filed against AEROTEK and their insurer ACE AMERICAN INSURANCE COMPANY, is not barred by the Statute of Limitations.

ORDER

IT IS ORDERED that the Application for Adjudication of Claim be amended to conform to proof that applicant sustained a cumulative trauma injury.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE A. ZALEWSKI, CHAIR

I CONCUR,

/s/ CRAIG SNELLINGS, COMMISSIONER

/s/ JOSÉ H. RAZO, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

January 17, 2023

SERVICE MADE ON THE ABOVE DATE ON THE PERSONS LISTED BELOW AT THEIR ADDRESSES SHOWN ON THE CURRENT OFFICIAL ADDRESS RECORD.

GLENN L. SILVERII & ASSOCIATES
LAW OFFICES OF VINCENT PURINTON LOWER & KESNER
MATIAN LAW GROUP
PRUSSAK, WELCH & A VILA
SAMUEL RAMIREZ
WALL MCCORMICK BAROLDI & DUGAN

MWH/mc

I certify that I affixed the official seal of the Workers' Compensation Appeals Board to this original decision on this date. *mc*